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No. 02-1183

In the
Supreme Court of the United States

UNITED STATES,
Petitioner,

v.

SAMUEL FRANCIS PATANE,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF OF THE STATES OF ALABAMA, ET AL., AS AMICI CURIAE IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether a failure to give the warnings prescribed by *Miranda v. Arizona*, 384 U.S. 436 (1966), requires the suppression of physical evidence derived from the suspect's unwarned but voluntary statement.

TABLE OF CONTENTS

QUESTION PRESENTED i

TABLE OF AUTHORITIES iii

INTEREST OF AMICI CURIAE 1

STATEMENT OF THE CASE 1

SUMMARY OF ARGUMENT 3

ARGUMENT 4

I. Even After *Dickerson*, the Purpose of the *Miranda* Rule Remains Prophylactic, and So Evidence Derived From an Unwarned but Uncoerced Statement Still Should Not Be Subject to the Exclusionary Rule of *Miranda* 4

II. The "Fruit of the Poisonous Tree" Doctrine Should Not Apply to an Unwarned, Uncoerced Statement, Because the Government Does Not Violate the Fifth Amendment Unless and Until It Attempts to Use That Statement During a Later Criminal Proceeding 11

III. An Unwarned, Uncoerced Statement Should Be Subject to a Less Stringent Rule of Exclusion Than a Coerced Statement That Violates Due Process. 14

IV. If *Dickerson* So "Fundamentally Altered" the Nature of *Miranda* As To Change the Scope of the Exclusionary Rule, Then the Limits That This Court Has Imposed on Other Constitutionally-Based Prophylactic Protections Will Also Be Called Into Question 18

CONCLUSION 19

TABLE OF AUTHORITIES

Cases

Brown v. Illinois, 422 U.S. 590 (1975) 7

Brown v. Walker, 161 U.S. 591 (1896) 17

Chavez v. Martinez, 123 S. Ct. 1994 (May 27, 2003) ..... *passim*

Dickerson v. United States, 530 U.S. 428 (2000) ..... *passim*

Dunaway v. New York, 442 U.S. 200 (1979) 7

Edwards v. Arizona, 451 U.S. 477 (1981) 9, 10

Haynes v. Washington, 373 U.S. 503 (1963) 15

Illinois v. McArthur, 531 U.S. 326 (2001) 8

Kastigar v. United States, 406 U.S. 441 (1972) 13, 17

Katz v. United States, 389 U.S. 347 (1967) 8

Linkletter v. Walker, 381 U.S. 618 (1965) 7

Malinski v. New York, 324 U.S. 401 (1945) 15

Malloy v. Hogan, 378 U.S. 1 (1964) 12

Mapp v. Ohio, 367 U.S. 643 (1961) 7

Michigan v. Harvey, 494 U.S. 344 (1990) ..... *passim*

Michigan v. Jackson, 475 U.S. 625 (1986) 10, 18

Michigan v. Tucker, 417 U.S. 433 (1974) ..... *passim*

Mincey v. Arizona, 437 U.S. 385 (1978) 16

Miranda v. Arizona, 384 U.S. 436 (1966) ..... *passim*

New Jersey v. Portash, 440 U.S. 450 (1979) 16

New York v. Quarles, 467 U.S. 649 (1984) 15

Oregon v. Elstad, 470 U.S. 298 (1985) ..... *passim*

Solem v. Stumes, 465 U.S. 638 (1984) 9

Stone v. Powell, 428 U.S. 465 (1976) 7

Ullmann v. United States, 350 U.S. 422 (1956) 17

United States v. Calandra, 414 U.S. 338 (1974) 7

United States v. Leon, 468 U.S. 897 (1984) 8, 9

United States v. Patane, 304 F.3d 1013 (10th Cir. 2002) 1, 2

United States v. Place, 462 U.S. 696 (1983) 8

United States v. Verdugo-Urquidez, 494 U.S. 259 (1990) 10, 12, 13

Withrow v. Williams, 507 U.S. 680 (1993) 7, 10

Wong Sun v. United States, 371 U.S. 471 (1963) 4

Statutes

18 U.S.C. § 922(g)(1) 2

Constitutional Provisions

U.S. Const., amend. V, cl. 3 12

INTEREST OF AMICI CURIAE

The amici States have an interest equally as strong as the petitioner federal government in preserving public safety and in investigating and prosecuting crimes. The holding of the court of appeals in this case threatens this interest by posing an unnecessary barrier to the gathering and use of physical evidence by law enforcement officers. Amici submit this brief to urge this Court not to adopt an interpretation of *Miranda* that over-deters the good-faith efforts of their law enforcement officers to apprehend and prosecute criminals.

STATEMENT OF THE CASE

Respondent Samuel Francis Patane, a convicted felon, was arrested in Colorado Springs, Colorado, for violating a restraining order that prohibited him from contacting his ex-girlfriend. After Patane's arrest, Detective Josh Benner "began advising Patane of his *Miranda* rights, but only got as far as the right to silence when Patane said that he knew his rights."[1] Benner did not complete the *Miranda* warning. Instead, he proceeded to tell Patane that he was interested in what guns Patane owned and asked him in particular about a Glock. Patane informed Benner that the Glock was in his bedroom on a wooden shelf. "Detective Benner asked for permission to get the gun, which Patane granted, and Detective Benner ... found the gun where Patane described, and seized it."[2]

Patane was subsequently indicted in the United States District Court for the District of Colorado for

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[1] *United States v. Patane*, 304 F.3d 1013, 1015 (10th Cir. 2002).

[2] *Id.*

possession of a firearm as a convicted felon, in violation of 18 U.S.C. § 922(g)(1). The district court suppressed the evidence of the Glock, finding that the police did not have probable cause to arrest Patane in the first place.

On appeal, the United States Court of Appeals for the Tenth Circuit held that the police did have probable cause to arrest Patane.[3] The court of appeals nevertheless affirmed on the ground that the Glock was the fruit of an unwarned confession. Although this Court had previously held that evidence derived from unwarned confessions was not subject to the exclusionary rule, the Tenth Circuit found that *Dickerson v. United States*[4] had "fundamentally altered" the premise of these decisions — namely, "the premise that the *Miranda* rule was a prophylactic rule, rather than a constitutional rule."[5] If *Miranda* were no longer just prophylactic, the Tenth Circuit reasoned that its exclusionary rule should not be limited to the unwarned statement. Rather, the exclusionary rule should extend to the "fruit of the poisonous tree" — to the physical and other evidence derived from the unwarned statement. Accordingly, because Detective Benner had not finished the *Miranda* warning before eliciting information from Patane about the location of the Glock, the Tenth Circuit ruled that the evidence of the Glock was inadmissible.

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[3] *Patane*, 304 F.3d at 1018.

[4] 530 U.S. 428 (2000).

[5] *Patane*, 304 F.3d at 1019 ("In *Dickerson*, the Supreme Court declared that *Miranda* articulated a constitutional rule rather than merely a prophylactic one").

SUMMARY OF ARGUMENT

In *Michigan v. Tucker*,[6] and again in *Oregon v. Elstad*,[7] this Court rejected application of the "fruit of the poisonous tree" doctrine to the *Miranda* exclusionary rule. In both cases, this Court held that the prophylactic purposes of the *Miranda* warnings rule warranted the exclusion of the unwarned confession only, not the exclusion of other evidence that the police may have derived from that confession. The Tenth Circuit erred in concluding that *Dickerson* supplanted these holdings.

Whether *Miranda* is regarded as a judge-made remedy or as a rule of constitutional origin, it remains a prophylactic requirement. The reasons that this Court gave in *Tucker* and *Elstad* for limiting the prophylaxis of *Miranda* to the confession itself are as valid today after *Dickerson* as they were at the time of *Tucker* and *Elstad*. First, the exclusionary rule provides diminished deterrence when the police act in good faith, which is generally the case when the police elicit an unwarned but also uncoerced statement that leads to the discovery of other evidence. Second, the exclusionary rule serves no truth-seeking purpose when applied to evidence whose reliability can be confirmed independently of the unwarned confession through the adversarial processes of a criminal trial.

This conclusion is reinforced by the theory underlying the *Miranda* rule, as articulated in *Dickerson* and even more recently in *Chavez v.*

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[6] 417 U.S. 433 (1974).

[7] 470 U.S. 298 (1985).

Martinez.[8] The government does not violate the right against self-incrimination merely by eliciting an unwarned confession. It violates the right only if it attempts to use the unwarned confession during a later criminal proceeding. Evidence derived from an unwarned confession thus cannot be considered to be the fruit of a poisonous tree, because there is yet no poison. The constitutional violation is inchoate at best.

Finally, it is sensible that evidence derived from an unwarned, uncoerced statement should be subject to a less stringent rule of exclusion than evidence derived from a statement that the government elicited by actual coercion. Failing to administer *Miranda* warnings is not a "core" Fifth Amendment violation. Actual coercion, by contrast, violates due process. Only evidence derived from an actually coerced statement should be subject to the rule of exclusion.

ARGUMENT

I. Even After *Dickerson*, the Purpose of the *Miranda* Rule Remains Prophylactic, and So Evidence Derived From an Unwarned but Uncoerced Statement Still Should Not Be Subject to the Exclusionary Rule of *Miranda*.

For three decades, this Court has refused to transpose the "fruit of the poisonous tree" doctrine[9] to violations of *Miranda*. In *Michigan v. Tucker*, the Court held that a *Miranda* violation did not warrant the suppression of "the testimony of a witness whom the police discovered as a result of [the unwarned]

[8] 123 S. Ct. 1994 (May 27, 2003).

[9] *Wong Sun v. United States*, 371 U.S. 471 (1963) (evidence derived from Fourth Amendment violations not admissible at trial).

statements."[10] In *Oregon v. Elstad*, the Court held that the Self-Incrimination Clause of the Fifth Amendment did not require the suppression of a confession, made after proper *Miranda* warnings and a valid waiver of rights, solely because police had obtained an earlier voluntary but unwarned admission from the suspect.[11] The Court found that "the dictates of *Miranda* and the goals of the Fifth Amendment proscription against use of compelled testimony [we]re fully satisfied ... by barring use of the unwarned statement in the case in chief."[12] On the basis of *Tucker* and *Elstad*, evidence derived from an unwarned statement has been deemed admissible at trial, even though the statement itself has not been.

Both *Tucker* and *Elstad* rest on the premise that *Miranda* warnings serve a prophylactic purpose. In these cases, this Court gave two reasons why the prophylactic purpose of the *Miranda* exclusionary rule did not warrant its application to evidence derived from an unwarned but otherwise voluntary statement. First, the exclusionary rule has diminished deterrent effect when the police act in good faith. In most cases, when the police elicit an uncoerced statement but did not precede it with *Miranda* warnings, it is fair to presume that the police acted in good faith. Here, for instance, Detective Benner's failure to complete the *Miranda* warning after Patane proclaimed he knew his rights appears to have been inadvertent and entirely bona fide. While it is still appropriate to exclude the unwarned statement at trial, so as to deter future negligence on the part of the police, it would over-deter

[10] 417 U.S. 433, 450 (1974).

[11] 470 U.S. 298, 317-18 (1985).

[12] *Id.* at 318.

the good-faith investigative efforts of the police to exclude not only the statement but also the evidence that the police were able to derive from that statement.

Second, the reliability of evidence discovered as the result of an unwarned statement can be confirmed independently of that statement. In this case, for instance, the police did not need Patane's statement to link him to the Glock once they found the Glock in his bedroom. Thus, the second prophylactic purpose of *Miranda* — to enhance the reliability of evidence used at trial — would not be served by a blanket rule prohibiting all derivative use.

These reasons for limiting the exclusionary rule to the unwarned statement are as valid today as they were in *Tucker* and *Elstad*. For years, state and federal law enforcement officers have relied on the availability of evidence derived from an unwarned, uncoerced statement. Stare decisis therefore counsels strongly against extension of the exclusionary rule to derivative evidence.

Furthermore, contrary to the holding of the Tenth Circuit, this Court's decision in *Dickerson v. United States* did not "fundamentally alter" the prophylactic purpose of *Miranda*.[13] In *Dickerson*, this Court clarified lingering confusion about the source of the *Miranda* doctrine by holding that it was constitutionally based and could not be overridden by statute. *Dickerson* did not state that it in any way affected the numerous other decisions of this Court implementing and refining *Miranda*.

The critical flaw in the Tenth Circuit's reasoning is the false dichotomy it draws between constitutional

[13] 530 U.S. 428 (2000).

and prophylactic rules. The court appears to have assumed that a prophylactic rule, because it covers more than just "core" violations of the constitutional right, is necessarily non-constitutional. As this Court's precedents make clear, however, a rule may be both constitutional and prophylactic. This Court has crafted other rules that, while prophylactic in purpose, are still constitutional in nature and so may not be overridden by statute or ignored by state courts.

The Fourth Amendment exclusionary rule is a notable example.[14] This Court has openly acknowledged that the Fourth Amendment exclusionary rule "fails to redress 'the injury to the privacy of the victim of the search or seizure' at issue, 'for any "[r]eparation comes too late."'"[15] Thus, the Fourth Amendment exclusionary rule, while undeniably constitutional in nature, cannot be justified as a direct remedy for the violation of a constitutional right. Rather, "[t]he purpose of the Fourth Amendment exclusionary rule is to deter unreasonable searches, no matter how probative their fruits."[16] The

[14] *Mapp v. Ohio*, 367 U.S. 643, 648 (1961) ("in the year 1914, in the *Weeks* case, this Court 'for the first time held that in a federal prosecution the Fourth Amendment barred use of evidence secured through an illegal search and seizure'").

[15] *Withrow v. Williams*, 507 U.S. 680, 686 (1993), *quoting Stone v. Powell*, 428 U.S. 465, 493 (1976), *quoting in turn Linkletter v. Walker*, 381 U.S. 618, 637 (1965).

[16] *Elstad*, 470 U.S. at 306 (citing *Dunaway v. New York*, 442 U.S. 200, 216-17 (1979); *Brown v. Illinois*, 422 U.S. 590, 600-02 (1975)); *see also Tucker*, 417 U.S. at 446 (the "prime purpose" of the Fourth Amendment exclusionary rule "is to deter future unlawful police conduct and thereby effectuate the guarantee of the Fourth Amendment against unreasonable searches and seizures") (quoting *United States v. Calandra*, 414 U.S. 338, 347 (1974)).

prophylactic purpose of the Fourth Amendment exclusionary rule explains the "good faith" exception that has been recognized by this Court.[17] If the objective of the Fourth Amendment exclusionary rule were just to remedy the constitutional violation, the officer's subjective mindset in committing the violation would not be relevant. By establishing the "good faith" exception, this Court made plain that "the exclusionary rule [wa]s designed to deter" future violations of the Fourth Amendment.[18] The rule is not itself a constitutional right, "but ... instead [a] measure to ensure that [the core] constitutional right[is] protected."[19]

Another example is the general warrant requirement of the Fourth Amendment. "[I]n 'the ordinary case,' seizures of personal property are 'unreasonable within the meaning of the Fourth Amendment,' ... 'unless ... accomplished pursuant to a judicial warrant,' issued by a neutral magistrate after finding probable cause."[20] Yet the text of the Fourth Amendment itself contains no requirement that a warrant be sought prior to any search or seizure.

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[17] *See United States v. Leon*, 468 U.S. 897, 926 (1984) (holding that when "officers' reliance on [a] magistrate's determination of probable cause was objectively reasonable, [the] application of the extreme sanction of exclusion is inappropriate").

[18] *Id.* at 916.

[19] *Michigan v. Harvey*, 494 U.S. 344, 351 (1990).

[20] *Illinois v. McArthur*, 531 U.S. 326, 330 (2001) (quoting *United States v. Place*, 462 U.S. 696, 701 (1983)); *see also Katz v. United States*, 389 U.S. 347, 357 (1967) ("searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment — subject only to a few specifically established and well-delineated exceptions").

Rather, it consists of "two prohibitory Clauses."[21] "The first Clause prohibits unreasonable searches and seizures and the second prohibits the issuance of warrants that are not supported by probable cause or that do not particularly describe the place to be searched and the persons or things to be seized."[22] The presumptions attached to the lack of a warrant have therefore been created by the Court as a prophylactic measure, designed to protect the core constitutional right against unreasonable searches and seizures.

Final examples are the prophylactic rules undergirding the rights to counsel in the Fifth and Sixth Amendments. In *Edwards v. Arizona*,[23] the Court "added a layer of protection to the *Miranda* rules, holding that 'when an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation even if he has been advised of his rights.'"[24] "*Edwards* thus established [a] prophylactic rule,"[25] "designed to implement pre-existing rights."[26] In *Michigan v.*

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[21] *Leon*, 468 U.S. at 960 (Stevens, J., concurring in part and dissenting in part).

[22] *Id.*

[23] 451 U.S. 477 (1981).

[24] *Michigan v. Harvey*, 494 U.S. 344, 350 (1990) (quoting *Edwards*, 451 U.S. at 484).

[25] *Id.* at 350.

[26] *Solem v. Stumes*, 465 U.S. 638, 645 (1984); see also *id.* at 645 (holding that *Edwards* was not to be applied retroactively, at least in part, because it is merely prophylactic and, therefore, "a far cry from the sort of decision that goes to the heart of the truthfinding function").

Jackson,[27] the Court "simply superimposed the Fifth Amendment analysis of *Edwards* onto the Sixth Amendment,"[28] thereby crafting a "prophylactic rule ... designed to ensure voluntary, knowing, and intelligent waivers of the Sixth Amendment right to counsel."[29]

No one would say that these various protections are non-constitutional in nature and thus may be overridden by statute or ignored by state courts. These rules — while "merely" prophylactic in that they do not directly convey a constitutional right — are still constitutional in nature because they buttress an underlying constitutional right. The same holds true for *Miranda*. "'Prophylactic' though it may be, in protecting a defendant's Fifth Amendment privilege against self-incrimination, *Miranda* safeguards 'a *fundamental trial right*.'"[30]

In short, *Dickerson* did nothing, either expressly or by implication, to disavow this Court's previous decisions characterizing the *Miranda* rule as "prophylactic." *Dickerson* clarified that the warnings required bv *Miranda* were constitutional in nature but it did not thereby alter their prophylactic purpose.

Indeed, just last Term, in *Chavez v. Martinez*, at least six members of this Court appeared to endorse a characterization of *Miranda* as prophylactic. Four members of the Court — including the Chief Justice,

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[27] 475 U.S. 625 (1986).

[28] *Harvey*, 494 U.S. at 350.

[29] *Id.* at 351.

[30] *Withrow v. Williams*, 507 U.S. 680, 691 (1993) (emphasis added) (quoting *United States v. Verdugo-Urquidez*, 494 U.S. 259, 264 (1990)).

who authored *Dickerson* — said: "We have ... established the *Miranda* exclusionary rule *as a prophylactic measure* to prevent violations of the right protected by the text of the Self-Incrimination Clause ...." [31] Two other members of the Court described *Miranda* as a "complementary rule in service of the core privilege" of the Fifth Amendment — language that appears synonymous with a characterization of *Miranda* as prophylactic.[32]

In view of these statements and the foregoing analysis, the Tenth Circuit was incorrect in concluding that *Dickerson* had implicitly overruled *Tucker* and *Elstad*. The *Miranda* rule was and is prophylactic. For the reasons set forth in *Tucker* and *Elstad*, the prophylactic purposes of the *Miranda* rule do not warrant an exclusionary rule that extends to evidence derived from an unwarned, uncoerced statement.

II. The "Fruit of the Poisonous Tree" Doctrine Should Not Apply to an Unwarned, Uncoerced Statement, Because the Government Does Not Violate the Fifth Amendment Unless and Until It Attempts to Use That Statement During a Later Criminal Proceeding.

The proposition that the *Miranda* exclusionary rule should not extend to derivative evidence is reinforced

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[31] 123 S. Ct. 1994, 2003 (May 27, 2003) (Thomas, J., joined by Rehnquist, C.J., and O'Connor and Scalia, JJ.). *See also id.* at 2008 (Scalia, J.) ("Section 1983 does not provide remedies for violations of judicially created prophylactic rules, such as the rule of *Miranda* ... as the Court today holds").

[32] *Id.* at 2007 (Souter, J., joined by Breyer, J.). *But see id.* at 2012 n. 3 (Stevens, J.) ("the Court disavowed the 'prophylactic' characterization of *Miranda* in *Dickerson*").

by the theory underlying the right against self-incrimination. When Detective Benner questioned Patane about the location of the Glock without completing the *Miranda* warnings, he did not violate the Self-Incrimination Clause of the Fifth Amendment. Even if he had coerced the statement from Patane, he still would not have violated the Self-Incrimination Clause (although he then would have violated due process[33]). Only if the government had later attempted to use Patane's unwarned statement at a criminal trial would it have violated the Fifth Amendment.

It thus makes no sense to treat evidence derived from Patane's statement as "fruit of the poisonous tree." At the time of the statement, there was no "poison." The government had not yet violated the Constitution.

This Court has long held that the government does not violate the right to self-incrimination unless and until it attempts to compel a defendant's testimony at trial. The text of the Self-Incrimination Clause makes this point clear. No one "shall be compelled *in any criminal case* to be a witness against himself ...."[34] Thus, "[t]he privilege against self-incrimination guaranteed by the Fifth Amendment is a fundamental *trial* right of criminal defendants."[35] "Although conduct by law enforcement officials prior to trial may

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[33] *See* n. 44.

[34] U.S. Const., amend. V, cl. 3.

[35] *United States v. Verdugo-Urquidez*, 494 U.S. 259, 264 (1990) (citing *Malloy v. Hogan*, 378 U.S. 1 (1964)) (emphasis added).

ultimately impair that right, *a constitutional violation occurs only at trial.*"[36]

Once again, this Court's recent decision in *Chavez v. Martinez*[37] is instructive. In *Chavez*, this Court reaffirmed that the government violates the right against self-incrimination only if it attempts to use an individual's statements against him at trial. Four Justices opined that the respondent in *Chavez* could not claim the violation of a constitutional right, even though the police had in some fashion pressured his statement, on the ground that he "was never made to be a 'witness' against himself in violation of the Fifth Amendment's Self-Incrimination Clause because his statements were never admitted as testimony against him in a criminal case."[38] "Statements compelled by police interrogations of course may not be used against a defendant at trial, but it is not until their use in a criminal case that a violation of the Self-Incrimination Clause occurs ...."[39] Two other Justices, while disagreeing with the plurality that the respondent could not claim a violation of due process, agreed that "the text of the Fifth Amendment ... focuses on courtroom use of a criminal defendant's compelled, self-incriminating testimony, and the core of the guarantee

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[36] *Id.* (emphasis added) (citing *Kastigar v. United States*, 406 U.S. 441, 453 (1972)).

[37] 123 S. Ct. 1994 (May 27, 2003).

[38] *Id.* at 2001 (Thomas, J., joined by Rehnquist, C.J., O'Connor and Scalia, JJ.).

[39] *Id.* (citation omitted).

against compelled self-incrimination is the exclusion of any such evidence."[40]

The timing of the constitutional violation explains why the Fourth Amendment exclusionary rule, while also prophylactic in purpose, sweeps more broadly than *Miranda*. An illegal search or seizure violates the Fourth Amendment at the time the police conduct it. The poison has already been introduced, and any evidence derived from the search or seizure is accurately considered "fruit of the poisonous tree."

But when the police violate *Miranda* by failing to advise a suspect of his rights before questioning, the constitutional violation is at best inchoate. The government can still avoid a constitutional violation by choosing not to introduce the suspect's testimony during a later criminal proceeding. For this reason also, evidence derived from an unwarned confession should not be subject to the *Miranda* exclusionary rule.

III. An Unwarned, Uncoerced Statement Should Be Subject to a Less Stringent Rule of Exclusion Than a Coerced Statement That Violates Due Process.

It is important to distinguish confessions that are unwarned *and* coerced from confessions that unwarned but voluntary. "There is a vast difference between the direct consequences flowing from coercion of a confession by physical violence or other deliberate means calculated to break the suspect's will and the uncertain consequences of disclosure of a 'guilty secret' freely given in response to an unwarned but

[40] *Id.* at 2006 (Souter, J., concurring in the judgment, joined by Breyer, J.).

noncoercive question, as in this case."[41] Detective Benner did not force Patane to divulge where he had the gun.[42] "[T]he police conduct at issue here did not abridge respondent's constitutional privilege against compulsory self-incrimination, but departed only from the prophylactic standards later laid down by this Court in *Miranda* to safeguard that privilege."[43]

Had the police in this case actually compelled Patane's statement about the Glock by force or threat of force, they would have violated due process[44] in addition to *Miranda*. In that case, the Glock would justifiably have been subject to the rule of exclusion.[45]

[41] *Elstad*, 470 U.S. at 312.

[42] Indeed, following Patane's unwarned statement, Detective Benner asked for permission to get the gun, and Patane granted it. In *Elstad*, the respondent gave an unwarned, verbal inculpatory statement to the police; he was subsequently administered *Miranda* warnings, and gave a second, written inculpatory statement. This Court rejected the respondent's contention that his written statement should be excluded because of the earlier *Miranda* violation, noting that intervening events may cause a suspect to give a subsequent admissible statement that is left untainted by a previous *Miranda* violation. *Elstad*, 105 S. Ct. at 1296. Similarly, Patane's decision to give permission to Detective Benner to obtain his gun may be construed as a voluntary act that renders the prior *Miranda* violation of no effect on the admissibility of the gun.

[43] *Tucker*, 417 U.S. at 445-46.

[44] *Dickerson*, 520 U.S. at 434 ("If all the attendant circumstances indicate that the confession was coerced or compelled, it may not be used to convict a defendant") (quoting *Malinski v. New York*, 324 U.S. 401, 404 (1945)); *Haynes v. Washington*, 373 U.S. 503, 513 (1963) ("a confession obtained by police through the use of threats is violative of due process").

[45] *New York v. Quarles*, 467 U.S. 649, 672 (1984) (O'Connor, concurring in part and dissenting in part) ("when the *Miranda* violation consists of a deliberate and flagrant abuse of the accused's

The constitutional violation would have been immediate, and the evidence derived from the statement would have been fruit of the constitutionally poisonous tree.

It is sensible that a less stringent rule of exclusion — covering only the statement itself and not evidence derived from the statement — should apply to an unwarned but uncoerced statement. It is enough that the uncoerced statement is already subject to exclusion. In the context of uncounseled but voluntary statements given after the police re-initiate conversation, this Court has stated:

> We have mandated the exclusion of reliable and probative evidence for all purposes only when it is derived from involuntary statements. [*New Jersey v. Portash*, 440 U.S. 450, 459 (1979) (compelled incriminating statements inadmissible for impeachment purposes); *Mincey v. Arizona*, 437 U.S. 385, 398 (1978) (same).] We have never prevented use by the prosecution of relevant voluntary statements by a defendant, particularly when the violations alleged by a defendant relate only to procedural safeguards that are "not themselves rights protected by the Constitution," [*Tucker*, 417 U.S. at 444 (*Miranda* rules),] but are instead measures designed to ensure that constitutional rights are protected. In such cases, we have decided that the "search for truth in a criminal case" outweighs the "speculative possibility" that exclusion of evidence might deter future

constitutional rights, amounting to a denial of due process, application of a broader exclusionary rule is warranted").

> violations of rules not compelled directly by the Constitution in the first place.[46]

Likewise here, excluding evidence derived from an unwarned, uncoerced statement would result in over-deterrence and needlessly deprive the justice system of evidence whose probity can be independently corroborated.

The absence of actual coercion also serves to distinguish the long line of cases in which this Court has held that "immunity from use *and derivative use* is coextensive with the scope of the privilege against self-incrimination."[47] These cases address the scope of immunity that the government must grant to a witness if it intends to force the witness, on pain of contempt, to testify at trial. In such circumstances, the government is not even hiding the fact that it intends to employ actual coercion to make the witness give a potentially inculpatory statement at a criminal trial. Were the government not to afford immunity, it would violate both due process and the right against self-incrimination by forcing the witness to testify. A broader privilege — prohibiting use *and* derivative use of the compelled testimony at a future criminal proceeding — is accordingly appropriate to staunch the constitutional poison and keep it from spreading.

In the absence of actual coercion, however, an unwarned statement should not trigger an exclusionary rule that is "coextensive with the privilege

[46] *Michigan v. Harvey*, 494 U.S. 344, 351-52 (1990) (holding that uncounseled statements may still be used for impeachment).

[47] *Kastigar v. United States*, 406 U.S. 441, 453 (1972) (emphasis added). *See also Brown v. Walker*, 161 U.S. 591 (1896); *Ullmann v. United States*, 350 U.S. 422 (1956).

against self-incrimination." Again, *Miranda* remains prophylactic, even if constitutionally based. Indeed, in *Dickerson*, this Court expressly declined to hold that "*Miranda* warnings are required by the Constitution, in the sense that nothing else will suffice to satisfy constitutional requirements."[48] For the prophylactic purposes of *Miranda*, it is sufficient that the unwarned statement itself be excluded. Evidence that is derived from the unwarned statement, like the Glock in this case, should continue to be admissible.

IV. If *Dickerson* So "Fundamentally Altered" the Nature of *Miranda* As To Change the Scope of the Exclusionary Rule, Then the Limits That This Court Has Imposed on Other Constitutionally-Based Prophylactic Protections Will Also Be Called Into Question.

Finally, the Tenth Circuit's ruling in this case calls into question the scope of other prophylactic protections that are presumably constitutionally based. For example, this Court has acknowledged that the *Jackson* rule excluding uncounseled statements made after the police re-initiate questioning is a "judicially created protection."[49] Accordingly, this Court has held that "the prosecution may use a statement taken in violation of the *Jackson* prophylactic rule to impeach a defendant's false or inconsistent testimony."[50] By the reasoning of the Tenth Circuit, however, a determination that the *Jackson* rule is constitutionally based would undermine this Court's reliance on the

[48] 530 U.S. at 442.

[49] *Michigan v. Harvey*, 494 U.S. 344, 351 (1990).

[50] *Id.* at 345-46.

"prophylactic" purpose of the rule in holding that a statement taken in violation of the rule may nevertheless be used to impeach. The same fate would logically befall any decisions of this Court that relied upon the "prophylactic" nature of a rule for imposing some sort of limit on its reach. In short, if this Court were to embrace the logic of the Tenth Circuit's ruling, it might open a Pandora's box of litigation in which the scope of this Court's various prophylactic doctrines will all have to be reassessed on the theory that they are constitutionally based.

CONCLUSION

For the foregoing reasons, the judgment of the United States Court of Appeals for the Tenth Circuit should be reversed.

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